No. 89-1924

In the Supreme Court of the United States

OCTOBER TERM, 1990

VITO SPILLONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government presented perjured testimony to the grand jury, and if so, whether petitioner's indictment should therefore have been dismissed.

2. Whether the electronic surveillance orders in this case met the particularity requirements of 18 U.S.C. 2518(4)(c) and the Fourth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 879 F.2d 514.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1989. A petition for rehearing was denied on February 12, 1990 (Pet. App. 31a). On May 14, 1990, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including June 12, 1990 (Pet. App. 32a), and the petition was filed on June 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)), and conspiring to commit that offense (18 U.S.C. 1962(d)). He also was convicted on two counts of making extortionate extensions of credit (18 U.S.C. 892) and on one count of using extortionate means to collect extensions of credit (18 U.S.C. 894).[1] He was sentenced to ten years' imprisonment and a $200,000 fine. The court of appeals affirmed. Pet. App. 1a-30a.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner ran a loansharking operation in the Los Angeles area between October 1980 and December 1981. Petitioner headed the organization; co-defendants Frank Citro and Frank Serrao and co-conspirator Raymond Cohen made the actual loans to the organization's victims;

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[1] Prior to trial, the government dismissed a charge of possessing firearms after a previous felony conviction (18 U.S.C. App. 1202(a)(1) (1982)). Petitioner stood trial with co-defendants John Clyde Abel, Frank Citro, Frank Serrao, John Barro, Joseph Bolognese, and John Meccia. Barro, Bolognese, and Meccia were acquitted on all charges against them, while Abel, Citro, and Serrao were convicted on the RICO substantive count but were acquitted on the RICO conspiracy count. Abel, Citro, and Serrao also were convicted on various charges of making extortionate extentions of credit and of using extortionate means to collect extensions of credit. The court of appeals affirmed Abel's and Citro's convictions in the same opinion that disposed of petitioner's claims. Serrao's appeal was delayed because of his first attorney's failure to file a brief. That appeal has been argued but is still pending. Gov't C.A. Br. 2-3 n.1.

and Serrao, co-defendant John Clyde Abel, and co-conspirators Kurt Ehle and Thomas Szamocki functioned as the organization's enforcers. Operating principally out of the California Bell Club, a licensed poker club in Bell, California, the organization made loans that bore interest at rates of five to ten percent per week. The loans were made with the understanding that a borrower's failure to make timely payments would result in physical reprisal. Abel, Serrao, Ehle, and Szamocki used violence or threats of violence to persuade various borrowers to repay their loans. Citro, Cohen, Abel, and Serrao collected the loan payments and turned their collections over to petitioner. He in turn gave them a percentage of the amounts they had collected. Pet. App. 3a; Gov't C.A. Br. 3-4.

2. a. Prior to trial, petitioner moved to suppress the fruits of electronic surveillance. He contended that the district court orders authorizing the surveillance were deficient under 18 U.S.C. 2518(4)(c) because they did not sufficiently particularize the offenses for which electronic surveillance was authorized.[2] The district court rejected that claim. Although one paragraph of the surveillance orders referred merely to offenses "enumerated in" 18 U.S.C. 2516, the district court noted that other paragraphs identified specific offenses subject to the surveillance —including extortion, interstate travel, and murder. Gov't C.A. Br. 6-7.

b. Both before and after trial, petitioner moved to dismiss the indictment on the ground that the gov-

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[2] Section 2518(4)(c) provides that every electronic surveillance order "shall specify * * * a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates[.]"

ernment had presented perjured testimony to the grand jury. In particular, petitioner claimed that grand jury witness Johnny Angelo had testified falsely about when he had become an informant and about any consideration he had received for his testimony; that the government had withheld from the grand jury information that undercut Angelo's credibility, particularly his criminal record; and that FBI Agent William Wiechert had compounded Angelo's perjury by repeating Angelo's false statement about the date he had become an informant. Angelo did not testify at trial, but petitioner secured an affidavit from him after trial. In that affidavit, Angelo claimed that he had been told by FBI agents to lie to the grand jury. Angelo later recanted that statement and testified at two post-trial hearings. Although he took issue with certain statements attributed to him in the government's affidavit for a wiretap order, Angelo said that he had testified truthfully before the grand jury. After considering all of petitioner's submissions, the district court denied his motion to dismiss the indictment. Pet. App. 15a-17a.

Petitioner also contended that government witness Irving Minster had perjured himself before the grand jury by denying that he was a loanshark at the California Bell Club. Petitioner further asserted that FBI Agent Wiechert and the prosecutor had known from a prior investigation that Minster's testimony was perjurious, but had failed to correct it. At trial, Minster repeated his denial of loansharking activities. Thereafter, Agent Wiechert testified about certain tape-recorded conversations with Minster suggesting that Minster was in fact a loanshark. The district court denied petitioner's mid-trial motion to dismiss the indictment on account of Minster's

perjury. The court explained that although the government had only belatedly revealed to defense counsel the evidence impeaching Minster as a witness, that evidence was nonetheless available in time for use at trial. The court also found that the government's trial attorneys had not been aware of the evidence, largely because of Wiechert's malfeasance, and thus dismissal would be inappropriate. The court denied petitioner's post-trial motion to dismiss the indictment on the same grounds, finding in addition that there was sufficient evidence to support the indictment without Minster's testimony. Pet. App. 19a-20a.

3. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-30a. It unanimously rejected his Title III claim, concluding that the wiretap orders, when construed as a whole, sufficiently particularized the offenses that were the authorized subjects of the surveillance orders. *Id.* at 4a-6a. By a divided vote, the court also rejected petitioner's prosecutorial misconduct claims. Relying on *United States* v. *Mechanik*, 475 U.S. 66 (1986), the court explained that, in view of petitioner's conviction at trial, any error in presenting Angelo's testimony to the grand jury was harmless. Pet. App. 17a. The court alternatively found, under *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988), that any errors involving Angelo's testimony did not substantially influence the grand jury's decision to indict petitioner. The court reached the same conclusion about Minster's grand jury testimony, finding that the prosecutors had not known of Minster's perjury and that there was ample other evidence to support the indictment. Pet. App. 19a-20a. Finally, the court held that the cumulative effect of the al-

leged misconduct did not warrant dismissal of petitioner's indictment. *Id.* at 20a-21a.[3]

Judge Pregerson concurred in part and dissented in part. Pet. App. 27a-30a. In his view, Angelo's false testimony about the date he had become an informant, coupled with the government's failure to advise the grand jury that it had terminated Angelo as an informant, warranted dismissal of the indictment. *Id.* at 27a-29a. Judge Pregerson also stated that the cumulative effect of the asserted misconduct required dismissal of the indictment. *Id.* at 29a-30a.

ARGUMENT

1. Petitioner contends (Pet. 9-13) that his indictment should have been dismissed because of alleged acts of misconduct before the grand jury. In particular, petitioner contends that the government failed to inform the grand jurors that Angelo, a witness before the grand jury, had nine felony convictions and had been discontinued as an informant. In addition, petitioner asserts that the prosecutor knowingly condoned perjurious grand jury testimony by Angelo and Minster. The courts below correctly rejected those claims.

In the first place, petitioner's assertions are factually inaccurate. While Angelo had several felony convictions, the government did not hide that fact from the grand jury. To the contrary, Angelo acknowledged at the outset of his first grand jury ap-

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[3] The court of appeals also rejected challenges to the jury instructions, the admission of certain evidence, and the trial court's decision to interrupt and restrict counsel's closing argument. Pet. App. 6a-10a, 21a-26a. The petition does not present those contentions.

pearance that he was then serving sentences on two state convictions. Gov't C.A. Br. 30. Similarly, at his second appearance, Angelo informed the grand jury that he had several convictions and had just been released from prison the previous week. *Ibid.* And the prosecutor told the grand jury that the government had arranged for Angelo to serve his state sentence in a federal institution under the federal witness protection program. *Id.* at 31. The grand jury therefore plainly knew that Angelo had an extensive criminal record. Moreover, there was no reason to advise the grand jury of Angelo's temporary deactivation as an informant. Angelo was deactivated in April 1982, but was reactivated as an informant in August 1983, prior to his second grand jury appearance. Since Angelo's temporary deactivation took place well after the wiretaps were completed on petitioner's and his co-defendants' telephones, nothing about Angelo's deactivation could have affected the propriety of the wiretaps, which corroborated much of his testimony before the grand jury. *Id.* at 32.

Beyond that, it is clear that Angelo's testimony was not necessary, let alone crucial, to obtaining the indictment against petitioner. All of the victims of petitioner's loansharking operation testified before the grand jury, and thus the grand jury heard abundant evidence about the offenses. Indeed, when Angelo thereafter became unavailable for trial, the government had to strike only two of the 40 overt acts in the indictment. See Pet. App. 17a. In short, as the court below held, Angelo's testimony "did not 'substantially influence the grand jury's decision to indict' nor conflict with the 'fundamental fairness' standard." *Id.* at 18a. What is more, the petit

jury's decision to convict petitioner—without Angelo's testimony—means "not only that there was probable cause to believe that [he was] guilty as charged, but also that [he is] in fact guilty as charged beyond a reasonable doubt." *Mechanik*, 475 U.S. at 70. In light of the overwhelming proof of petitioner's guilt—both before the grand jury and at trial—the failure to inform the grand jury of Angelo's temporary deactivation as an informant, or of the exact number and nature of Angelo's prior convictions, cannot have been material to the grand jury's decision.

The same is true of Minster's testimony. As the courts below found, see Pet. App. 20a, the prosecutors did not "condone" Minster's perjury. Indeed, the prosecutors did not learn of the perjury until mid-trial. See *ibid.* And petitioner offers no reason to dispute the lower courts' factbound conclusion that any misconduct concerning Minster was harmless. *Id.* at 19a-20a.

For these reasons, petitioner's reliance (Pet. 10) on *Napue* v. *Illinois*, 360 U.S. 264 (1959), is misplaced. In *Napue*, the Court held that a conviction may not be based on the knowing use of perjured testimony. In the present case, by contrast, there was no "knowing" use of perjured testimony, either in the grand jury or at trial, as both lower courts made clear. Pet. App. 20a. At trial, the jury received evidence through Agent Wiechert that cast substantial doubt on Minster's claim that he was not engaged in loansharking. The petit jury's verdict, based on evidence that revealed the suspect nature of Minster's claim of innocence, shows that the grand jury was not deceived by Minster's testimony into

returning an indictment when one was not warranted.[4]

2. Petitioner also contends (Pet. 14-15) that the wiretap orders did not sufficiently particularize the crimes that were the authorized subjects of the surveillance. There is no merit to that claim.

The wiretap orders stated in pertinent part that there was probable cause to believe that petitioner and others were engaging in extortion in violation of the Hobbs Act (18 U.S.C. 1951), interstate travel in aid of extortion (18 U.S.C. 1952), extortionate credit transactions (18 U.S.C. 892-894), conspiracies to commit those offenses (18 U.S.C. 371), and RICO violations (18 U.S.C. 1962) with the foregoing offenses as predicate acts. Pet. App. 5a. The first order also stated that the interceptions would focus on racketeering activities "involving extortion and murder." *Ibid.*

Petitioner concedes (Pet. 14) that the orders particularized the foregoing crimes, but he claims (*ibid.*) that the orders were nevertheless too general because another paragraph stated that the interceptions would involve "the offenses enumerated in Sec-

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[4] Neither is this case like *Mesarosh* v. *United States*, 352 U.S. 1 (1956). There the government discovered after trial that one of its principal witnesses had likely testified falsely in other cases. This Court reversed and ordered a new trial, concluding that the defendant's conviction could not rest on tainted testimony. *Id.* at 9. In the present case, however, the evidence at trial revealed the likely falsehood of Minster's claim of innocence. Moreover, the courts below found that petitioner had an ample opportunity at trial to challenge Minster's perjury. The courts also concluded that, in light of the wealth of evidence before both the grand jury and petit jury, petitioner had not shown that either his indictment or conviction rested on tainted testimony.

tion 2516." As the court of appeals explained, the latter, general statement was limited by other, more specific references to particular offenses. Pet. App. 5a-6a. The courts of appeals have uniformly upheld wiretap orders under such circumstances. See, *e.g.*, *United States* v. *Giacalone*, 853 F.2d 470, 480-481 (6th Cir.), cert. denied, 488 U.S. 910 (1988); *United States* v. *Licavoli*, 604 F.2d 613, 620 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980); *United States* v. *Cohen*, 530 F.2d 43, 45-46 (5th Cir.), cert. denied, 429 U.S. 855 (1976); *United States* v. *Turner*, 528 F.2d 143, 153-155 (9th Cir.), cert. denied, 423 U.S. 996 (1975). See also *United States* v. *Carneiro*, 861 F.2d 1171, 1179 (9th Cir. 1988); *United States* v. *Smith*, 726 F.2d 852, 865 (1st Cir.), cert. denied, 469 U.S. 841 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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